U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

Before the Federal Communications Commission
Washington, D. C. 20554

In the Matter of	)	
Toll Free Service Access Codes	)	CC Docket No. 95-155

PETITION FOR RECONSIDERATION OF THE FOURTH REPORT AND ORDER FOR TOLL FREE SERVICE ACCESS CODES FROM THE OFFICE OF ADVOCACY, UNITED STATES SMALL BUSINESS ADMINISTRATION

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EXECUTIVE SUMMARY

The Office of Advocacy of the United States Small Business Administration ("Advocacy") submits this Petition for Reconsideration of Federal Communications Commission ("FCC" or Commission") *the Fourth Report and Order,* CC Docket. No. 95-155, FCC 98-48, (rel. Mar. 31, 1998), in the Toll Free Service Access Codes proceeding. The Office of Advocacy was established by Congress in 1976 by Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634 a-g, 637) to represent the views and interests of small business within the federal government. Its statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, developing proposals for changes in federal agencies' policies and communicating these proposals to the agencies. 15 U.S.C. § 634c(1)-(4). Advocacy also has a statutory duty to monitor and report on the FCC's compliance with the Regulatory Flexibility Act of 1980 ("RFA"), Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

As previously addressed in Advocacy's comments in this docket, in particular ex parte comments dated March 17, 18, and 25, 1998, we detailed the significant economic impact that the roll out of the new 877 toll free code would have on small Responsible Organizations ("RespOrgs") and small business toll free subscribers. Primarily, we were concerned (and rightly so given the actual circumstances of the deployment of 877) that the Commission's "first come, first served" method of number

allocation was not truly first-come, first-served due to difficulties that a substantial number of small RespOrgs would have in accessing the database and the conflict of interest inherent in the structure of larger toll free carriers and their RespOrg affiliates/subsidiaries.

However, the traditional purpose for filing a Petition for Reconsideration, as a means to solicit changes to the deployment process of the 877 code and reconsideration of its roll out, has been mooted in this instance. The roll out of 877 occurred on April 5, 1998, under a "first-come, first-served" allocation process less than a week after the adoption and release of this Report and Order. The roll out of 877 and the method of its deployment are now subject only to judicial challenge. Therefore, in this Petition for Reconsideration Advocacy requests that the Commission eliminate the problems and market entry barriers in future roll outs that made the actual deployment of 877 grossly inefficient, patently unfair, and very difficult for many small entities as foreseen by Advocacy and other commenters; correct several material deficiencies in the Final Regulatory Flexibility Analysis ("FRFA"); and clarify significant portions of the *Fourth Report and Order* for the benefit of small businesses and future roll outs.

The Commission has violated the Administrative Procedure Act, 5 U.S.C. § 551 et seq. by: 1) failing to explain adequately its decision to adopt a first-come, first-served allocation process and not addressing the concerns of small businesses expressed in the administrative record; and 2) failing to explain adequately whether trademark law offers sufficient protection to toll free subscribers upon the Commission's rejection of the right of first refusal option.

The *Fourth Report and Order* is also inconsistent with the congressional intent of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"),

to foster competition in all telecommunications markets because it does not acknowledge and, subsequently, eliminate the regulatory-based market entry barriers that new entrant and small RespOrgs face in providing ancillary services to toll free telecommunications in competition with large carrier/RespOrgs. 47 U.S.C. § 257.

The Commission is also required to prepare a regulatory flexibility analysis as a matter of law pursuant to the RFA when there is a "significant economic impact on a substantial number of small entities." *See* 5 U.S.C. § 605. Advocacy asserts that the Commission has not complied with several statutory requirements of the RFA by: 1) failing to consider all small business comments and undertake an analysis of the economic impact of its proposals and final rule on all small entities *during* the rulemaking process; 2) failing to identify properly, describe, and reasonably estimate the number of all small entities to which these rules will apply; 3) failing to analyze and explain the impact of its final rule on all classes of small business subscribers and small RespOrgs; 4) failing to analyze all significant alternatives to the proposed rule and to provide "a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected." 5 U.S.C. § 604(a)(5).

Finally, Advocacy questions the material inconsistency between the Commission's *Fourth Report and Order* and the Commission's responsive pleading to ResponseTrak Call Center's Emergency Request for Stay before the United States Court of Appeals for the District of Columbia Circuit. *ResponseTrak Call Centers v. Federal Communications Commission*, Case No. 98-1195 (D.C. Cir. April 16, 1998) (emergency request for stay denied). The Commission has set forth two conflicting explanations for the application of

its "first-come, first-served" allocation process for new toll free codes. In its *Fourth Report and Order*, the Commission asserts that the allocation of numbers applies to subscribers. Conversely, the FCC's Opposition claims that the process does not apply to subscribers, but to RespOrgs.

This inconsistency raises serious questions about the Commission's compliance with the Administrative Procedure Act, the Regulatory Flexibility Act, and whether its rules actually minimize the adverse impact on small businesses that it alleges. This inconsistency also frustrates future enforcement and/or legal action because the rights and responsibilities of subscribers and RespOrgs are not clearly defined. Therefore, Advocacy requests clarification of the Commission's position of whether or not the "first-come, first-served" allocation process applies to subscribers, or to RespOrgs. Advocacy also requests that the Commission make the appropriate adjustments in its regulatory flexibility analysis.

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FROM THE OFFICE OF ADVOCACY OF THE
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The Office of Advocacy of the United States Small Business Administration ("Advocacy") submits this Petition for Reconsideration of the Federal Communications Commission's ("FCC" or "Commission") *Fourth Report and Order,* CC Docket. No. 95-155, FCC 98-48, (rel. Mar. 31, 1998), in the above-captioned proceeding. The Office of Advocacy was established by Congress in 1976 by Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634 a-g, 637) to represent the views and interests of small business within the federal government. Its statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, developing proposals for changes in federal agencies' policies and communicating these proposals to the agencies. 15 U.S.C. § 634c(1)-(4). Advocacy also has a statutory duty to monitor and report on the FCC's compliance with the Regulatory Flexibility Act of 1980 ("RFA"), Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996

("SBREFA"), Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

Advocacy is very appreciative that the Commission adopted the *Fourth Report and Order* prior to the roll out of 877. Nonetheless, we have several concerns. As previously addressed in Advocacy's comments in this docket, in particular ex parte comments dated March 17,18, and 25, 1998, we detailed the significant economic impact that the roll out of the new 877 toll free code would have on small Responsible Organizations ("RespOrgs") and small business toll free subscribers. Primarily, we were concerned (and rightly so given the actual circumstances of the deployment of 877) that the Commission's "first come, first served" method of number allocation was not truly first-come, first-served due to difficulties that a substantial number of small RespOrgs have in accessing the database[1] and the conflict of interest inherent in the structure of toll free carriers and their RespOrgs affiliates/subsidiaries.[2]

However, the traditional purpose for filing a Petition for Reconsideration, as a means to solicit changes to the deployment process of the 877 code and reconsideration of its roll out, has been mooted in this instance. The roll out of 877 occurred on April 5, 1998, under a "first-come, first-served" allocation process less than a week after the adoption and release of this Report and Order. The roll out of 877 and the method of its deployment are now subject only to judicial challenge. Therefore, in this Petition for

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[1] "Many small RespOrgs access the SMS database by dial-up circuits (larger RespOrgs have direct connections); however for 700+ users of dial-up - there are only 240 data modem ports. Given start of implementation of 877, 66% of dial-up users will get a busy signal!" Written *Ex Parte* Presentation, Adverse Economic Impact on Small Businesses Resulting From Proposed April 5 Implementation of 877, Office of Advocacy, United States Small Business Administration, TLDP Communications, Inc., ICB, Inc., ReponseTrak Call Centers, and New England 800 Company, Mar. 17, 1997, at 2 ("*Advocacy Joint Ex Parte Presentation*").

[2] *See e.g., id.*

Reconsideration Advocacy requests that the Commission eliminate the problems and market entry barriers in future roll outs that made the actual deployment of 877 grossly inefficient, patently unfair, and very difficult for many small entities as foreseen by Advocacy and other commenters; correct several material deficiencies in the Final Regulatory Flexibility Analysis ("FRFA"); and clarify significant portions of the *Fourth Report and Order* for the benefit of future roll outs and small businesses.

I. The Commission's Fourth Report And Order Violates The Administrative Procedure Act.

Pursuant to the Administrative Procedure Act, 5 U.S.C. § 551 et seq., the FCC is required to issue rational rules.[3] To determine whether the results of informal rulemaking meet that standard, the rulemaking record must support the factual conclusions underlying the rule, the policy determinations undergirding the rule must be rational, and the agency must adequately explain its conclusions.[4] Therefore, the failure to address major issues on the administrative record, to consider an important aspect of the problem, and to complete a proper regulatory flexibility analysis violates the APA.[5]

The Commission has violated the Administrative Procedure Act, 5 U.S.C. § 551 et seq. by: 1) failing to explain adequately its decision to adopt a first-come, first-served allocation process and not addressing the concerns of small businesses expressed in the administrative record; and 2) failing to explain adequately whether trademark law offers

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[3] *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Bowen v. American Hospital Ass'n*, 476 U.S. 610, 643-45 (1986).

[4] *McGregor Printing Corp. v. Kemp*, 20 F.3d 1188, 1194 (D.C. Cir. 1994); *see also MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988).

[5] *See Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); *see also Thompson v. Clark*, 741 F.2d 401 (D.C. Cir. 1984) ("[a] reviewing court should consider regulatory flexibility analysis as part of its overall judgment whether a rule is reasonable and may, in an appropriate case, strike down a rule because of a defect in a flexibility analysis").

sufficient protection to toll free subscribers upon the Commission's rejection of the right of first refusal option.

A. The Commission Did Not Adequately Explain Its Decision To Adopt A First-Come, First-Served Allocation Process.

First, in its rationalization of the "first come, first served" allocation of new toll free access codes, the Commission stated "that it is noteworthy that the industry has used a first-come, first-served process for reserving non-vanity toll free numbers and experience to date has shown that, in general, a first-come, first served policy is efficient." *Fourth Report and Order*, para. 23 (emphasis added) (citation omitted). Well, of course it is efficient for this purpose. Non-vanity numbers are fungible, in a word "generic," serving the sole purpose of providing access to toll free service for its subscriber. It makes no difference what number is allocated to whom, in what order, nor at what time. Nor would there be any problems with a lock-out of the SMS database, nor a need to expedite entry into the database just to get to a particular number before anyone else. Therefore, a first-come, first-served process for non-vanity number injures no one. However, by the Commission's own admission, vanity numbers are a "value to their subscribers because they can generate high visibility and consumer recognition when used in advertising." *Fourth Report and Order*, para. 1. Moreover, the right to control a vanity number has "inherent value in the marketplace."[6]

Obviously it makes a great deal of difference to whom a vanity number is assigned to and whether the subscriber is first or not in the allocation process given the tremendous value of vanity numbers. To equate the method of allocating vanity numbers with non-

[6] *Play Time, Inc. v. LDDS Metromedia Communications*, 123 F.3d 23, 31 (1st Cir. 1997).

vanity numbers ignores marketplace realities, small business concerns, flaunts established case law, and is therefore, arbitrary and capricious.[7]

Second, the Commission summarily dismissed in this proceeding Advocacy's and other commenters argument that the inherent conflict of interest in the structure and different functions of large carriers with RespOrg affiliates/subsidiaries provides an unfair advantage over small businesses subscribers.[8] The Commission stated in its *Fourth Report and Order* that this conflict of interest issue was "outside the scope of this proceeding" and would be addressed in its Reconsideration of the *Second Report and Order*. *Fourth Report & Order*, para. 40 n.78 (citing to *In re* Toll Free Service Access Codes, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 11162 (1997) ("*Second Report and Order*"). This assertion is not only erroneous but further illustrates either an ignorance of marketplace realities, or an insensitivity to the difficulties of small businesses subscribers and providers (including new entrants) in dealing with large carriers for number reservation, assignments, and account management. It is important to note that the Commission has not denied that a conflict of interest exists, only that it is outside the scope. The fact is that the self-serving financial interests of carriers manifested by the conflict of interest issue permeates through each and every one of the Commission's toll free proceedings in this docket, this proceeding in particular which sets forth the allocation process for new access codes and vanity numbers. This conflict of interest issue is no different from how the monopoly status and subsequent market power of Regional Bell Operating Companies ("RBOC") permeate through every FCC

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[7] *Illinois Public Telecommunications Ass'n v. Federal Communications Commission*, 117 F.3d 555 (D.C. Cir. 1997) (holding that the FCC's decision to impose a compensation rate for toll-free and access code calls based on the local coin rate, given record evidence, was arbitrary and capricious).

proceeding implementing Sections 251, 254 , 271-275 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

Advocacy did not ask for the Commission to eliminate totally the conflict of interest nor to prohibit carriers from serving as RespOrgs. *See Fourth Report and Order*, para. 40 n.78. Such a task would be difficult given that the Commission created the administrative structure for toll free numbers decades ago and, arguably, such an undertaking is outside the scope of this specific proceeding. We simply requested that the Commission fulfill its statutory obligation under the APA and the RFA, in addition to its public interest mandate under the Communications Act of 1934, 47 U.S.C. § 151 et seq., to acknowledge the effect that this conflict of interest has in the allocation of new toll free codes, consider this issue in its deliberations, and to take steps to mitigate the significant economic harm on small businesses that the conflict of interest imposes. The Commission's failure to act in this respect violates the law and has unreasonably exacerbated the problem given the continuing difficulty of small subscribers in securing requested numbers in the 877 and 888 codes from large carrier/RespOrgs.

Although the *Fourth Report and Order* is void of any discussion on this issue, other sources illuminate the Commission's position. It has been suggested that resolution of a subscriber's conflict of interest problems with a large carrier/RespOrg can be simply made by "choos[ing] a RespOrg that is not a carrier."[9] Advocacy agrees that a subscriber has a choice but questions whether this choice is realistic. It is necessary for the

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[8] *See e.g., Advocacy Joint Ex parte Presentation*, at 1

[9] Letter from Gloria Tristani, Commissioner, FCC, to Rep. John E. Baldacci, United States House of Representatives (Mar. 30, 1998).

Commission to look at the reality behind such a decision and to recognize that a "Catch-22" position often exists for a small business subscriber.

Large RespOrgs have an enormous supply of numbers in their reserved pool and direct access into the database which provides immediate and efficient assignment of numbers. Moreover, it is often necessary for a subscriber to use a particular RespOrg which has a specific number in its reserved pool. With a larger pool of numbers on reserve larger carriers are more likely to have the desired number. Unfortunately carrier/RespOrgs have also treated their small subscribers unfairly given the lower volume of business generated by small business compared to a large business.[10] Small business subscribers are often victims of larger carriers/RespOrgs that have either negligently, purposefully, or fraudulently mishandled number reservations and accounts.[11]

On the other hand, a small business subscriber that uses a non-carrier RespOrg, (also likely to be a small entity or new entrant), is often disadvantaged because smaller RespOrgs do not have a large pool of reserved numbers, diminishing the chance that a specific number is available from a small RespOrg. Also, a substantial number of smaller RespOrgs do not have direct access to the SMS database due to its tremendous cost. This has a direct impact on whether a subscriber will receive its requested or reserved number or not. Advocacy raised this issue as a market entry barrier to the provision of

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[10] *Play Time, Inc. v. LDDS Metromedia Communications, Inc.*, 123 F.3d 23 (1st Cir. 1997). In *Play Time*, the court noted some significance in the WorldCom Vice President's inquiry of "how much money the Number could be expected to produce" upon being informed that a desirable vanity number had been taken from a family-owned business that was first to request the number from WorldCom's RespOrg. *Id.* at 26. The likelihood of an insignificant generation revenue by the account was a primary factor in the Vice President's refusal to address the subscriber's problem. *Id.*

[11] See e.g., *Play Time*, 123 F.3d 231; *ResponseTrak Call Centers v. FCC*, Case No. 98-1195 (D.C. Cir. April 16 ,1998); and the American Telegram Corporation ("ATC") case that is addressed in the *Fourth Report and Order and Memorandum Opinion and Order*, paras. 34-38 (ATC's RespOrg, affiliated with LDDS Worldcom, failed to reserve two of its requested 888 toll free numbers.)

telecommunications services that should have been addressed pursuant to the Commission's statutory obligation under 47 U.S.C. § 257.[12]

For example, it has been reported that small RespOrgs were "locked out" of the SMS database for over an hour when attempting to dial in to the system just seconds after the opening of the 877 code on Sunday, April 5, 1998.[13] Furthermore, "[r]ather than all RespOrgs unlocking simultaneously, it seems that different RespOrgs gained access after the initial frozen period gradually, at varying times, compounding the inequity in how these 877 numbers were distributed."[14]

As a resolution to the access problem of small RespOrgs, it has been asserted that "direct connections are equally available for purchase by both small and large [RespOrgs]."[15] However, this assertion is no different than claiming that facilities-based service is equally available to any new entrant who wants to provide local telephone service. The cost of entry is just as prohibitive for those small business toll free providers who want direct access to the database as it is for new entrants who want to be facilities-based providers for local telephone service. That is why many new entrants for local service chose resale over constructing their own plant. For the same reasons, small RespOrgs chose dial-up access. Granted, the cost of entry between the two services is significant, but the principle remains the same.

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[12] Letter from Jere W. Glover, Chief Counsel for Advocacy, and S. Jenell Trigg, Assistant Chief Counsel for Telecommunications, Office of Advocacy, United States Small Business Administration, to William E. Kennard, Chairman, FCC (Mar. 25, 1998). Advocacy includes a copy of this letter with this Petition, Appendix A.

[13] *1 877 Disarray*, ICB Toll Free News, Apr. 6, 1998. See Appendix B.

[14] *Id.*

[15] Letter from Michael A. Powell, Commissioner, FCC, to Rep. John E. Baldacci, United States House of Representatives (Mar. 27, 1998).

More importantly, the subscriber's prerogative to switch RespOrgs or a RespOrgs' options for access do not alleviate the Commission's obligation to level the playing field between large and small RespOrgs. Advocacy sees no difference in the Commission's obligation to eliminate market entry barriers in toll free service, whether it is direct or dial-up access, from the Commission's obligation to level the playing field for new entrants in the local switched network, whether it is resale or facilities-based. *See* 47 U.S.C. §§ 257, 251. In a few areas in the country consumers also have a choice between the Incumbent Local Exchange Carrier ("ILEC") and a new entrant competing against the ILEC for local telephone service, and yet the Commission has demonstrated an unswerving commitment to protect that choice and increase competition for local service by new entrants. Small businesses and new entrants in toll free service also deserve the same commitment and protection from the Commission. By passage of the 1996 Act Congress also envisioned private sector deployment, which includes small businesses, as a means to "open[ ] all telecommunications markets to competition." S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996) (emphasis added). This certainly includes toll free service.

B. The Commission Violated the APA Because It Did Not Adequately Explain Whether Trademark Law Would Be Sufficient Protection for Toll Free Subscribers.

The Commission sought comment on "whether, in the event that we deny a right of first refusal, trademark law provides sufficient protection to current holders of 800 numbers." *Fourth Report and Order*, para. 7. Indeed, the Commission rejected the right of first refusal proposal, but did not discuss the issue of trademark protection nor justify its implicit conclusion that trademark law is sufficient protection for incumbent toll free subscribers. *See id.* para. 27 ("We disagree, however, that a right of first refusal is the

only way subscribers can protect these investments. Some toll free subscribers may have recourse to the trademark protection laws.").

Advocacy requests that the Commission properly address the trademark and unfair competition issues with full discussion of the opposing views in the administrative record, Appendix D, Comments Summary, paras. 12-13, and clarify whether legal protection is sufficient to compensate subscribers for the Commission's rejection of the right of first refusal. Advocacy reminds the Commission that it also has a statutory duty pursuant to the Regulatory Flexibility Act to address whether court relief under trademark or unfair competition law is a realistic option for a small business subscriber given its fewer financial resources. Congress recognized that "the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity." 5 U.S.C. § 601(4).[16]

II. The Commission's Final Regulatory Flexibility Analysis Violates the RFA.

We first address a very important, albeit, collateral matter. Advocacy is curious about the disclaimer in the FRFA that states, "[t]o the extent that any statement contained in this FRFA is perceived as creating ambiguity with respect to our statements made in preceding sections of this Fourth Report and Order, the statements set forth in those preceding sections shall be controlling." *Fourth Report and Order*, Appendix B, para. 2.

This disclaimer attempts to get the Commission off the hook if its FRFA has not been reconciled with the body of its *Fourth Report and Order*. Advocacy does not

[16] Small subscribers and small RespOrgs are regulated entities since they are subject to the rules and regulations set forth in this *Fourth Report and Order*. *See Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327 (1985).

believe that SBREFA gives agencies this option. If there is ambiguity or a conflict, a FRFA has to be changed.

Pursuant to § 611 of the RFA, as amended, the FRFA stands on its own under judicial review, including any inconsistencies that arguably could support a finding that the FRFA was arbitrary and capricious.[17] A disclaimer does not negate the Commission's statutory duty, as noted below, to undertake a proper regulatory flexibility analysis nor take the necessary time and effort to ensure that such analysis is manifestly logical.[18]

The Commission is required to prepare a regulatory flexibility analysis as a matter of law pursuant to the RFA when there is a "significant economic impact on a substantial number of small entities." *See* 5 U.S.C. § 605. Advocacy asserts that the Commission has not complied with several statutory requirements of the RFA by: 1) failing to consider all small business comments and undertake an analysis of the economic impact of its proposals and final rule on all small entities *during* the rulemaking process; 2) failing to identify properly, describe, and reasonably estimate the number of all small entities to which these rules will apply; 3) failing to analyze and explain the impact of its final rule on all classes of small business subscribers and small RespOrgs; 4) failing to analyze all significant alternatives to the proposed rule and to provide "a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which

[17] *See Thompson v. Clark*, 741 F.2d 401, 407 (D.C. Cir. 1984) ("when an agency prepares regulatory flexibility analyses . . . the court will consider their contents (including any defects they may contain) 'as part of its overall judgment whether a rule is reasonable' under 5 U.S.C. § 553." (citation omitted) (emphasis added).

[18] This disclaimer further supports Advocacy's concerns that the FRFA was a post hoc effort. *See infra* Section II.A.

affect the impact on small entities was rejected." 5 U.S.C. § 604(a)(5) (emphasis added).

The Regulatory Flexibility Act of 1980 was designed to place the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.[19] Major objectives of the RFA are: 1) to increase agency awareness and understanding of the impact of their regulations on small business; 2) to require that agencies communicate and explain their findings to the public; and 3) to encourage agencies to use flexibility and to provide regulatory relief to small entities where feasible and appropriate to its public policy objectives.[20]

On March 29, 1996, the SBREFA was signed into law and, *inter alia*, amends the RFA to allow judicial review of an agency's compliance with the RFA. 5 U.S.C. § 611.[21] Even prior to the SBREFA amendments adding judicial review of final regulatory flexibility analyses, courts have held that failure to undertake a proper regulatory flexibility analysis could result in arbitrary and capricious rulemaking in violation of the APA.[22] Two years after SBREFA was passed, there is a growing body of case law on the RFA, as amended.

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[19] *See* 5 U.S.C. § 601(4)-(5).

[20] *See generally*, Office of Advocacy, U.S. Small Business Administration, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*, 1998 ("*Advocacy 1998 RFA Implementation Guide*").

[21] The sections of the RFA that are subject to independent judicial review of final agency action are Sections 601, 604, 605(b), 608(b) and 610. 5 U.S.C. § 611. Sections 607 and 609(a) shall be reviewable in connection with the judicial review of section 604. *Id.*

[22] *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984); *see also Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 538 (D.C. Cir. 1983).

The RFA does not seek preferential treatment for small businesses, nor does it require agencies to adopt regulations that impose the least burden on small entities or mandate exemptions for small entities. Rather, it establishes an analytical process for determining how public issues can best be resolved without erecting barriers to competition. The law seeks a level playing field for small business, not an unfair advantage. To this end, the RFA requires the FCC to analyze the economic impact of proposed regulations on different-sized entities, estimate each rule's effectiveness in addressing the agency's purpose for the rule, and consider alternatives that will achieve the rule's objectives while minimizing the burden on small entities. 5 U.S.C. § 604.

> Advocacy acknowledges that different classes of small entities subject to and affected by the rules in this proceeding (RespOrgs, carriers, and subscribers), as well as incumbent and potential small business toll free subscribers, will differ on the issues and have conflicting concerns. We also recognize that it is necessary to balance these interests, however, only after a complete analysis of the impact that the proposed rules will have on each class of small entity. The congressional intent of the RFA was for agencies to use the regulatory flexibility analysis as a tool to reach a well-founded decision based on legal, policy and factual factors, as well as minimize the economic impact on small entities.[23]

[23] Regulatory Flexibility Act, Pub. L. No. 96-354, § 2(b), *see also Advocacy 1998 RFA Implementation Guide.*

A. The Fourth Report and Order and the FRFA Violate the RFA Because The Commission Has Ignored Small Business Comments and Has Not Properly Analyzed The Economic Impact Of Its Proposed and Final Rules on Small Businesses During The Rulemaking Process.

Advocacy asserts that the Commission ignored material small business concerns on the administrative record. In its haste to release *the Fourth Report and Order* prior to the designated roll out date for the 877 code the Commission neglected to fulfill its statutory obligation to analyze fully the impact of its rules on small businesses before it reached a final decision. One of the fundamental legal obligations imposed by the RFA as it relates to the Commission's rulemaking process is that an analysis of the effect of its rules and policies on small entities must be made *during* the rulemaking process, and that a FRFA is not drafted in a post hoc manner as a means for cursory compliance with the law. 5 U.S.C. § 604; *see also Southern Offshore Fishing Ass'n v. Daley*, No. 97-1134-CIV-T-23C, 1998 WL 125775 (M.D. Fla. filed Feb. 24, 1998) at 21-22.

The Commission's summary dismissal of the conflict of interest issue (*supra* pages 4-7), failure to address the market entry barriers issues raised by Advocacy *(supra* pages 7-9 and Appendix A), and the conspicuous absence of any discussion on the final rules' detrimental impact on a substantial number of incumbent small business subscribers (*infra* pages 17-19) all support this assertion.

Furthermore, the Commission relies on the "industry" for many of its conclusions without acknowledging that some segments of the "industry" are dominated by large entities. The Commission identified in one instance the Alliance for Telecommunications

Industry Solutions ("ATIS") and Service Management System ("SMS") Number Administration Committee ("SNAC"). *Fourth Report and Order*, para. 10 n.36. However, Advocacy is not confident that SNAC nor ATIS fairly or adequately represent the views of small RespOrgs, small toll free providers (including secondary market providers),[24] and small business subscribers. Advocacy does not assert that the industry's views are not important, but reminds the Commission that it has a statutory obligation also to solicit and consider the views of small entities. 5 U.S.C. § 609 ("the agency . . . shall assure that small entities have been given the opportunity to participate in the rulemaking . . . ."); *see also Southern Offshore Fishing*, 1998 WL 125775.[25]

The Commission has a duty under the RFA (and the APA) to reconcile the "industry's" claims that the scheduled roll out of 877 was necessary because 888 toll free numbers were close to exhaustion from the small business claims that such industry assertions were premature, if not exaggerated. The Commission does not offer any discussion about the rate of exhaustion nor the available numbers in the database pool to support its conclusion that 877 needed to be rolled out as scheduled on April 5, nor why a 30-day delay would not have been reasonable. The request for a 30-day delay in the roll

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[24] *Office of Advocacy Ex parte Petition for Reconsideration of the Second Report and Order for Toll Free Service Access Codes*, Dec. 12, 1997, at 16-17 ("*Advocacy Ex Parte Petition*"). The Commission received letters from Senators Leahy, Snowe, and Collins, in addition to Representatives Baldacci, and Allen.

[25] Although we are grateful for the opportunity for small business owners to meet with Commission staff, Advocacy is very disappointed that the *FCC Small Business Roundtable on Toll Free* held on April 2, 1998, was not held prior to the Commission's adoption of the *Fourth Report and Order*. This meeting detailed many small business concerns and economic impact of the cumulative impact of all of the Commission's rules and policies in this docket, including concerns about the Commission's overall rulemaking process. Letter From S. Jenell Trigg, Assistant Chief Counsel for Telecommunications, Office of Advocacy, United States Small Business Administration, to Magalie Roman Salas, Secretary, FCC, Apr. 3, 1998 (*Ex parte* Notification).

out of 877 was made by ResponseTrak, ICB Inc., Vanity International, TLDP Communications, Inc., the Office of Advocacy on behalf of all small business subscribers (incumbent and potential), and several congressional members.[26] The Commission's neglect in responding to this issue in its *Fourth Report and Order* and the FRFA is inexcusable and in direct violation of the RFA and APA.

B. The FRFA Violates The RFA Because It Did Not Identify All The Small Businesses Engaged In Providing Toll Free Service To Which The Rule Will Apply.

There are various classifications of small entities that are affected by the Commission's actions in this proceeding that are within the scope of the RFA. They generally include small business toll free subscribers (including small governmental jurisdictions), small Responsible Organizations "RespOrgs" and small toll free providers including businesses that provide toll free service on the secondary market.[27]

In the section entitled "*Description and Estimate of the Number of Small Entities to Which the Rules Will Apply*," paras 5-28, the Commission has done a fine job of identifying and estimating the number of the traditional industry entities, i.e., interexchange carriers, telephone companies, RespOrgs, PCS, cellular, etc. However, the Commission fails to identify, describe, and estimate the entire class of small businesses that provide toll free service, including those on the secondary market. The Commission does

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Advocacy also encourages the Commission to be more sensitive to the needs of small businesses in regards to scheduling meetings given the cost of last minute travel arrangements and difficulties that small businesses incur when leaving their businesses.

[26] *Advocacy Joint Ex parte Presentation*; *see also* Ex Parte Comments of Vanity International and Petition to Stay 877 Implementation Pending Reconsideration of the 8xx Plan, April, 1998.

[27] The variety of private entities that also provide access to a toll free numbers, (either by sale or lease) are loosely classified as the secondary market. *Advocacy Ex Parte Petition*, at 11-12.

include a generic listing of Toll Free Subscribers,[28] but businesses such as telemarketing companies (SIC Code 7389), public relations firms (SIC Code 8743); marketing consultants (SIC Code 8742), advertising agencies (SIC Code 7311), commercial catalog publishers (SIC Code 2741 and retail/mail-order firms (SIC Code 5961), direct mail advertising services (SIC Code 7331), computer customer services (See generally SIC Industry Group 731 Businesses Services); and bundled and shared-use providers (see telemarketing), are very different from a typical "subscriber."[29] A description and estimate of the number of these entities should have been included in the Initial Regulatory Flexibility Analysis ("IFRA") and the FRFA. The economic impact of these rules on the secondary market is also different and more substantial than the impact on a typical subscriber.[30]

In fact, Advocacy first raised the issue in its December 1997 *ex parte* comments on the *Second Report and Order*, that the Commission's identification of small subscribers was insufficient in these proceedings, including those issues related to vanity numbers. *Id.* at 13.

C. The FRFA Violates The RFA Because It Failed To Analyze And Explain The Impact Of Its Proposed And Final Rule On All Classes of Small Business Subscribers And Small RespOrgs.

Section 607 of the RFA requires that the Commission "provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the

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[28] *Fourth Report and Order*, para. 10.

[29] A provider on the secondary market can also be an end user/subscriber if the provider uses his own toll free number for providing access to toll free service to a third party. Some secondary market providers sell or lease toll free service for non-subscribed numbers.

[30] *Advocacy Ex parte Petition*, at 19-23.

proposed rule, or more general descriptive statements if quantification is not practicable or reliable" in its compliance with §§ 603, 604. 5 U.S.C. § 607.

The courts have recognized that compliance with the RFA "does not require mechanical exactitude."[31] However, the Commission does have an unambiguous statutory obligation under § 607 "to inform the public about potential adverse effects" of its proposals.[32]

In the FRFA, the Commission offers zero discussion about the adverse economic affect of its rejection of the right of first refusal and the adoption of the first-come, first served process on a substantial number of incumbent 800 toll free subscribers as required by § 607 despite a wealth of comments in the administrative record and numerous ex parte meetings with Commissioners and FCC staff. For example, the Commission acknowledges that there are current problems with "customer confusion, misdialing, and dilution of investments." *See Fourth Report and Order*, para. 23. The Commission's statement that such problems will diminish over time with the introduction of new codes does not mean that incumbent subscribers are not harmed by these problems today - at the time the rules were promulgated. Nor does it excuse the Commission from its duty to identify these problems in the FRFA.

Although the FRFA addresses the adverse impact of the right of first refusal for future codes for new/potential subscribers, this is insufficient. *Fourth Report and Order*, Appendix B, para. 31. As mentioned previously, there are two classes of small business subscribers: current holders (incumbents) of 800 vanity numbers, and new (potential)

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[31] *Southern Offshore Fishing Ass'n v. Daley,* No. 97-1134-CIV-T-23C, 1998 WL 125775 (M.D. Fla. filed Feb. 24, 1998) at 22.

[32] *Id.* (quoting *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 114-15 (1st Cir. 1997)).